Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-440

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,
Appellants,

v.

CITY OF MADISON, COUNTY OF DANE, and CITY OF MADISON Acting as City School District Known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON AND PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,
Appellees.

On Appeal from the Supreme Court of Wisconsin

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Supreme Court of Wisconsin on the grounds that (1) the appeal is not within the jurisdiction of this Court because the decision appealed is not a final judgment or decree within the meaning of 28 U.S.C. § 1257, and (2) the appeal does not present a substantial federal question.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. *The Statute.*

The appeal raises the question of whether a provision of the Wisconsin antitrust statute (§ 133.23, Wisconsin Statutes) is unconstitutional on its face. The provision declares void any contract made by a person while a member of a combination or conspiracy in restraint of trade if the contract was founded on, was the result of, grew out of, or was connected with the combination or conspiracy. The provision also allows any payments made on the contract to be recovered. The statute provides that the action to recover payments must be brought within six years after the contract is made.

B. *The Proceedings Below.*

The appellee's second amended complaint alleged a conspiracy to rig bids on public construction contracts. It sought treble damages and (except to the extent that a double recovery might result) recovery of payments made on the contracts. The appellants demurred, in part on the ground that the statutory provision for recovery of payments deprived them of property without due process of law. The trial court overruled the demurrer on all grounds. Jurisdictional Statement, Appendix at pp. 1-13; reported sub nom. *City of Madison v. C. A. Hooper Co.*, 1975-2 CCH Trade Cases ¶ 60,417. The appellants appealed to the Wisconsin Supreme Court. While that appeal was pending, the appellants answered the second amended complaint. The answer denied the allegations and raised various affirmative defenses, including the defense that the statute in question was unconstitutional. The Wisconsin Supreme Court affirmed the order overruling the demurrer. Jurisdictional Statement, Appendix at pp. 14-38; reported, 73 Wis. 2d 364, 243 N.W. 2d 422 (1976). It held that the statutory remedy of recovering payments was not unconstitutional on its face. Jurisdictional Statement, Appendix at pp. 33-36. The Wisconsin Supreme Court expressly said that the appellants could raise the constitutional issue again after the facts were developed at trial. Id. at p. 36. Subsequently, the appellants moved for summary judgment in the trial court. The motion is pending. Discovery is in progress. The case has not yet been scheduled for trial.

II

ARGUMENT

A. *The Appeal Is Not Within the Jurisdiction of This Court Because the Decision Appealed Is Not a Final Judgment or Decree Within the Meaning of 28 U.S.C. § 1257.*

In the decision under appeal, the Wisconsin Supreme Court merely overruled a demurrer. It expressly allowed the appellants to renew their constitutional claim at trial. The decision did not finally decide the case or the constitutional issue raised. It simply held that the Wisconsin Supreme Court would not overturn the statute until it knew the facts.

Under 28 U.S.C. §1257, only "final judgments or decrees" rendered by a state's highest court may be reviewed in this Court. As the Court explained in *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 381-382 (1953):

> "Congress has limited our power to review judgments from state courts lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment."

In *Pope*, this Court found an exception to the usual rule because the petitioner, once his demurrer was overruled, had no other defense to interpose. "[N]othing remain[ed] to be done but the mechanical entry of judgment by the trial court." 345 U.S. at 382. The unusual situation present in *Pope* is absent

here. The appellants acknowledge that they have a defense on the merits. Jurisdictional Statement, p. 7. In fact, they have asserted many defenses. Among other things, they have denied the alleged conspiracy, invoked the statute of limitations, alleged that they are discharged from liability by settlements with other defendants, and challenged the recovery-of-payments remedy as unconstitutional.

The case may thus be decided—either by summary judgment or by trial—without requiring a decision by this Court on the constitutionality of the statute in question. The appellants ask this Court to render precisely the kind of advisory opinion, in advance of trial, that Congress sought to avoid.

This case also does not fit any of the four categories "in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). First, the federal issue is not conclusive and the outcome of further proceedings is not preordained. See 420 U.S. at 479. Even if recovery of payments were unconstitutional, the appellees would continue to sue for treble damages. Moreover, the appellants acknowledge that they have other defenses. Jurisdictional Statement, p. 7. Second, this is not a case where the federal issue will survive, regardless of the outcome of future state court proceedings. See 420 U.S. at 480. If, for example, the appellants establish the statute of limitations as a defense, the constitutional issue becomes moot. Third, the federal constitutional claim has not been finally decided. See 420 U.S. at 481. It has been deferred until the facts are developed at trial. If the appellees win a judgment for recovery of payments, the constitutional issue can be reviewed in this Court at that time. Fourth, reversal of the Wisconsin Supreme Court would not preclude further litigation on the cause of

action for conspiracy. See 420 U.S. at 483. It would merely limit the appellees' remedy to treble damages.

The appellants claim that this Court has jurisdiction simply because a large judgment might put them out of business. Jurisdictional Statement, pp. 7-8. This prophecy of doom lacks any foundation in the record. Moreover, the appellants ask this Court to assume that both the trial court and the Wisconsin Supreme Court will hold the statute constitutional as applied to the facts—an issue neither court has faced. The facts of the case are not yet before the Wisconsin courts. Adjudication of an abstract constitutional issue in this Court is therefore premature.

B. *The Appeal Does Not Present a Substantial Federal Question.*

The challenged statute (§133.23, Wisconsin Statutes) allows the victim of an antitrust conspiracy to recover payments made on a contract affected by the conspiracy. It prevents the conspirator from keeping the fruits of the unlawful contract. The appellants claim this statute is unconstitutional *on its face*, because it is disproportionate to the offense. In substance, the appellants assert that the penalty is unconstitutionally disproportionate to actual damages. Yet, until the facts are known, neither this Court nor the Wisconsin courts can determine either the size of the penalty or the amount of actual damages. The amount of actual damages is not even alleged in the second amended complaint. A court must measure the crime before it decides whether the punishment fits. Accordingly, a challenge to the statute *on its face* is insubstantial. The constitutional question will become properly framed only when the statute is applied to the facts.

Moreover, the interrelationship between actual damages (under §133.01, Wisconsin Statutes) and recovery of payments

(under §133.23) means that the larger the amount of actual damages, the smaller the amount of payments recovered. As the Wisconsin courts have indicated, actual damages must be found, trebled, and then offset against total payments to determine the amount of payments to be recovered. See Jurisdictional Statement, Appendix at pp. 10-11, 36. If actual damages reach one-third of total contract payments, §133.23 will have no effect at all. The constitutional question will then be moot.

Finally, a penalty is not constitutionally tested by its mere size or even by its proportion to actual damages. Congress has recognized that the substantial penalties are appropriate in antitrust cases by increasing to $1,000,000 the maximum fine which may be imposed on a corporation for a violation of the Sherman Act. See 15 U.S.C. §1. This Court has recognized that the constitutional yardstick is not the actual damages sustained, but rather the public interest in enforcing the law and the relation of the penalty to that purpose. *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63 (1919).

In short, the appellants' constitutional argument rests on unfounded speculation about what facts may turn up at trial. The appeal therefore does not present a substantial federal question.

III

CONCLUSION

The appellees respectfully submit that this Court lacks jurisdiction of the appeal and that the appeal does not present a substantial federal question. For these reasons, the appellees move the Court to dismiss the appeal or, in the alternative, to affirm the decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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